First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–62–91
JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
9 JUNE 1993

Civil Procedure *— Action for discovery — Defendant not himself a wrongdoer — Defendant had no connection with wrongdoing — Circumstances where action for discovery alone will lie*

Civil Procedure *— Striking out — Action for discovery — Principles to be applied — Rules of the High Court 1980 O 18 r 19*

The plaintiff (respondent) in this case was the beneficial owner of shares ('the shares') in the fifth defendant company (appellant). The first and second defendants were business associates while the third and fourth defendants were incorporated companies related to the first and second defendants. The plaintiff had contracted to sell the shares to the first, second, third and fourth defendants. The mode of making payment of the purchase price of the shares to the plaintiff stipulated in the agreement was that the first, second, third and fourth defendants had the option of paying the moneys to the account of several companies under the control of the plaintiff and which had obtained loans from the fifth defendant. Each of these loans were loans to related persons, contrary to s 133A of the Companies Act 1965 and therefore illegal.

The plaintiff's claim against the first, second, third and fourth defendants was for the purchase price of the shares. By their defence the first, second, third and fourth defendants claimed to have paid the purchase price towards the loans for the benefit of the borrower companies. As against the fifth defendant, the plaintiff claimed discovery of certain information, ie the relevant accounts showing the alleged payment, if any, of the purchase price by the first to the fourth defendants. The fifth defendant applied to strike out the plaintiff's claim for discovery against it, contending that the statement of claim, insofar as it involved the fifth defendant, did not disclose a reasonable cause of action and that it was frivolous, vexatious or an abuse of the process of the court. The learned trial judge refused to strike out the plaintiff's claim against the fifth defendant and the fifth defendant appealed.

Held, allowing the appeal:

(1) The general rule as laid down in *Norwich Pharmacal Co v Customs and Excise Commissioners*[2] is that discovery to find the identity of the wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. To this

general rule, there is an exception that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, yet he is under a legal duty to assist the person who had been wronged by giving him full information and in making disclosure of the identity of the wrongdoers.

(2) The case of *Norwich Pharmacal Co v Customs and Excise Commissioners*[2] was in effect a consolidation of the earlier authorities on discovery and the court would follow the principles enunciated by the House of Lords in that case.

(3) In this case the learned trial judge was in error in holding that primarily the plaintiff's claim against the fifth defendant was an action for discovery merely because the plaintiff had also prayed in his statement of claim for other reliefs which, however, did not by themselves indicate what the cause of action was upon which the plaintiff was relying against the fifth defendant. The judge ought to have held that the plaintiff's action against the fifth defendant was for discovery alone.

(4) The learned trial judge was also in error in holding that the plaintiff had brought himself within the ambit of the exception defined by the House of Lords in the *Norwich Pharmacal* case.[2] In this case the identity of those who were alleged to have committed the wrongful acts vis-a-vis the plaintiff were known to the plaintiff and had been cited as the first to the fourth defendants in the action. Further, the cause of action pleaded against the first to the fourth defendants was grounded in contract and not in tort, so that there was no question of the plaintiff being able to invoke the exception defined in the *Norwich Pharmacal* case,[2] which related to tortious acts.

(5) A Norwich Pharmacal Order being an equitable remedy will not be granted as of right even when the requirements for it were satisfied and the court has a discretion as to whether to grant or refuse it.

(6) The appeal was allowed and the action, insofar as the fifth defendant is concerned, was struck out.

[Bahasa Malaysia summary

Plaintif (penentang) di dalam kes ini adalah pemunya benefisial beberapa saham di dalam syarikat yang menjadi defendan kelima (perayu). Defendan pertama dan kedua adalah rakan perniagaan sementara defendan ketiga dan keempat adalah syarikat yang telah diperbadankan yang ada kena-mengena dengan defendan pertama dan kedua. Plaintif telah mengikat kontrak untuk menjual saham-sahamnya kepada defendan pertama, kedua, ketiga dan keempat. Cara membuat pembayaran harga pembelian saham-saham itu kepada plaintif yang ditetapkan dalam perjanjian itu ialah bahawa defendan pertama, kedua, ketiga dan keempat mempunyai pilihan membayar jumlah itu ke dalam akaun beberapa syarikat di bawah kawalan plaintif

yang telah mendapat pinjaman dari defendan kelima. Tiap-tiap pinjaman itu telah dibuat kepada orang yang ada kena-mengena dengan syarikat itu, bertentangan dengan s 133A Akta Syarikat 1965 dan oleh demikian menyalahi undang-undang.

Tuntutan plaintif terhadap defendan pertama, kedua, ketiga dan keempat adalah untuk harga pembelian saham-saham itu. Di dalam pembelaan mereka defendan pertama, kedua, ketiga dan keempat mendakwa bahawa mereka telah membayar harga pembelian itu untuk menjelaskan pinjaman-pinjaman syarikat-syarikat tersebut yang telah meminjam wang dari defendan kelima. Terhadap defendan kelima plaintif menuntut untuk mendapat maklumat tertentu iaitu akaun-akaun berkenaan yang menunjukkan, jika ada, pembayaran harga pembelian yang dikatakan telah dibayar oleh defendan pertama hingga keempat. Defendan kelima telah memohon supaya tuntutan plaintif mendapat penzahiran terhadapnya itu dibatalkan oleh kerana pernyataan tuntutan itu, setakat mana ia melibatkan defendan kelima, tidak menzahirkan kausa tindakan yang munasabah dan oleh kerana ia adalah remeh, menyusahkan dan menyalahgunakan proses mahkamah. Hakim perbicaraan yang arif telah menolak permohonan untuk membatalkan tuntutan plaintif terhadap defendan kelima dan defendan kelima telah merayu.

Diputuskan, membenarkan rayuan itu:

(1) Rukun am seperti yang ditetapkan di dalam kes *Norwich Pharmacal Co v Customs and Excise Commissioners*[2] ialah bahawa penzahiran untuk mendapati identiti orang yang bersalah boleh dituntut terhadap sesiapa dengan mana plaintif mempunyai kausa tindakan mengenai kesalahan yang sama. Terdapat suatu kecualian pada rukun am ini, iaitu jika tanpa kesalahannya sendiri, seseorang telah termasuk campur dengan perbuatan tort orang lain supaya memudahkan kesalahan mereka itu, sungguhpun ia sendiri tidak mungkin dikenakan liabiliti peribadi, tetapi ia dikenakan tanggungjawab di sisi undang-undang untuk membantu orang yang menjadi mangsa kesalahan itu dengan memberi maklumat sepenuhnya dan memberitahu identiti orang-orang yang bersalah itu.

(2) Kes *Norwich Pharmacal Co v Customs and Excise Commissioners*[2] sebenarnya menjadi pengukuhan autoriti-autoriti sebelumnya mengenai penzahiran dan mahkamah akan mengikut prinsip-prinsip yang diterangkan oleh House of Lords dalam kes itu.

(3) Dalam kes ini hakim perbicaraan yang arif tersilap dalam memutuskan bahawa terutamanya tuntutan plaintif terhadap defendan kelima adalah satu tindakan untuk penzahiran hanya oleh kerana plaintif telah juga memohon dalam pernyataan tuntutannya untuk mendapat relief yang lain yang akan tetapi tidak dengan sendirinya menunjukkan atas kausa tindakan yang mana plaintif bergantung terhadap defendan kelima. Hakim itu seharusnya memutuskan bahawa tindakan plaintif terhadap defendan kelima hanya untuk penzahiran sahaja.

(4) Hakim perbicaraan yang arif juga tersilap dalam memutuskan bahawa plaintif telah membuktikan beliau termasuk di dalam lingkungan kecualian yang diterangkan oleh House of Lords di dalam kes *Norwich Pharmacal.*[2] Di dalam kes ini identiti orang yang dikatakan telah melakukan perbuatan yang salah terhadap plaintif telah diketahui oleh plaintif dan telah dinamakan sebagai defendan pertama hingga keempat, dalam tindakannya itu. Tambahan lagi, kausa tindakan yang dibawa terhadap defendan pertama hingga keempat adalah bersandarkan kepada kontrak dan bukan kepada tort, dan oleh kerana itu tidaklah timbul peluang bagi plaintif menggunakan kecualian yang diterangkan dalam kes *Norwich Pharmacal*[2] yang berhubung dengan perbuatan tort.

(5) Perintah Norwich Pharmacal yang menjadi remedi ekuiti tidak akan diberi secara hak walaupun syarat-syarat yang perlu untuk mendapatnya telah dipenuhi dan mahkamah mempunyai budi bicara sama ada untuk memberi perintah itu atau tidak.

(6) Rayuan itu dibenarkan dan tindakan itu setakat defendan kelima sahaja dibatalkan.]

Notes

For cases on striking out, see 2 *Mallal's Digest* (4th Ed) paras 1780–1831 and 2430–2439.

Cases referred to

1 *Shaw v Smith* (1887) 18 QBD 193 (refd)
2 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133; [1973] 2 All ER 943; [1973] 3 WLR 164 (folld)
3 *Bankers Trust Co v Shapira* [1980] 1 WLR 1274; [1980] 3 All ER 353 (refd)
4 *Loose v Williamson* [1978] 3 All ER 89; [1978] 1 WLR 639 (Note) (refd)
5 *Societe Romanaise de la Chaussure SA v British Shoe Corp Ltd* [1991] FSR 1 (refd)
6 *Ricci v Chow* [1987] 1 WLR 1658; [1987] 3 All ER 534 (refd)
7 *British Steel Corp v Granada Television* [1982] AC 1096; [1981] 1 All ER 417; [1980] 3 WLR 774 (refd)
8 *RCA Corporation v Reddingtons Rare Records* [1974] 1 WLR 1445; [1975] 1 All ER 38 (refd)
9 *Upmann v Elkan* (1871) LR 12 Eq 140; (1871) LR 7 Ch App 130 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 50
Civil Law Act 1956 s 3(1)(a)
Companies Act 1965 s 133A
Rules of the High Court 1980 O 18 r 19

Appeal from: Suit No D3–22–1218 of 1990 (High Court, Kuala Lumpur)

Cecil Abraham (*Shearn, Delamore & Co*) for the appellant.
KS Narayanan (*KS Narayanan Associate*) for the respondent.

Edgar Joseph Jr SCJ (delivering the grounds of judgment of the court): Broadly stated, the question which arose for decision in this appeal was whether the learned judge in the High Court (Mr Justice VC George) was right in refusing to strike out the action against the appellant, the First Malaysia Finance Bhd (formerly known as Central Malaysian Finance Bhd), although the respondent's action against it was one for discovery alone. The application to strike out was made under the provisions of O 18 r 19 of the Rules of the High Court 1980 and also under the inherent jurisdiction of the court, on the ground that the statement of claim, insofar as it involved the fifth defendant, did not disclose a reasonable cause of action and also because it was frivolous, vexatious or an abuse of the process of the court.

It would be more convenient, if we referred to the appellant and the respondent, as the fifth defendant and the plaintiff respectively.

The case for the fifth defendant may be taken in substance from its written submission and is as follows:

At all material times, the plaintiff was and is a businessman and the beneficial owner of 11,979,333 ordinary shares of RM1 each in the fifth defendant ('the shares').

The first and the second defendants, Dato' Chen Lip Keong and Dato' Haji Abdul Rahman Hamzah, respectively, are business associates while the third and the fourth defendants, Kemajuan Holdings Sdn Bhd and First Holdings Sdn Bhd, respectively, are incorporated companies related to the first and the second defendants.

By several sale and purchase agreements in writing ('the agreements') the plaintiff had contracted with the first, the second, the third and the fourth defendants, to sell the shares to them.

The mode of making payment of the purchase price of the shares to the plaintiff stipulated in the agreements was that the first, the second, the third and the fourth defendants had the option of paying the moneys to the account of several companies under the control of the plaintiff and which had obtained loans from the fifth defendant, particulars whereof appear in annexure K to the agreements. Each of these loans were loans to related persons, and so, contrary to s 133A of the Companies Act 1965 and therefore illegal.

By reason of the purchase aforesaid, the first to the fourth defendants had taken over the management and control of the fifth defendant.

On 9 August 1990, the plaintiff had issued the writ herein against the defendants. The plaintiff's claim against the first, the second, the third and the fourth defendants was for the purchase price of the shares.

By their defence, the first, the second, the third and the fourth defendants claimed to have paid the purchase price towards the annexure K loans for the benefit of the annexure K borrower companies.

The plaintiff's claim as against the fifth defendant, was for certain information, that is to say, that, if, as alleged by the first, the second, the third and the fourth defendants, the purchase price had been paid by them

into the annexure K companies, then, the plaintiff wished to have discovery of the relevant accounts.

Before the learned judge, it was contended on behalf of the fifth defendant, that there was no cause of action for information, especially since the information could be obtained by subpoena.

The learned judge referred, first of all, to the principle that the right to discovery or inspection must have some foundation and must depend on some other right for which the authority is *Shaw v Smith*.[1] But, he then added, that in the House of Lords case of *Norwich Pharmacal Co v Customs and Excise Commissioners*,[2] it was held that in the special circumstances of that case an action for discovery alone can exist.

For the effect of the *Norwich Pharmacal* case[2] the learned judge referred to the following passage in the 1988 *White Book* at para 24/1/4:

> An action for discovery alone does not lie against a defendant who is not himself a wrongdoer and has no connection with the wrongdoing. But where a defendant through no fault of his own (and whether voluntarily or not) 'has got mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoers'.

The learned judge then reasoned as follows:

> In the instant case I do not think that anybody has, up to now, been accused of tortious acts. However, wrongdoing by way of breach of contract and what could be breach of trust on the part of the first to the fourth defendants is alleged. No allegation of wrong-doing is seriously made against the fifth defendant company save the accusation that it is holding on to securities that should be handed over to the plaintiff. However and in any event, it is suggested in the statement of claim that the fifth defendant albeit through no fault of its own has, by being a company once controlled by the first to the fourth defendants and having the accounts and the securities of the annexure K customers, got mixed up in the wrongdoing of the first to the fourth defendants and indirectly can be said to have facilitated such wrongdoing.

And, he concluded as follows:

> In the circumstances I am constrained to the view that the situation here is more of a *Norwich Pharmacal Co* situation than a *Shaw v Smith* situation.
>
> Accordingly, in the face of the plaintiff saying as he does by his statement of claim that the first to the fourth defendants have done wrong and that the fifth defendant has information that will enable the plaintiff to bring home the wrong to the first to the fourth defendants and that in any event the fifth defendant has securities that should be given to the plaintiff, I do not think that I should accede to the invitation by the fifth defendant to summarily have the claim as against the fifth defendant struck off — at least in respect of the prayers set out in para 17A(1) of the statement of claim. However, I fail to see any basis at all for the order sought in the plaintiff's para 17A(2).

Before us, counsel for the fifth defendant had taken three separate points:

> Firstly, it was argued that the fifth defendant says that there is no cause of action for information especially since the said information can be obtained by subpoena.
>
> Secondly, the fifth defendant says that the information sought is confidential

as between banker and customer (ie between the appellant and the K-annexure companies) pursuant to s 97 of the Banking and Financial Institutions Act 1989.

Thirdly, the fifth defendant says it is no longer a proper defendant to this action because all its assets and liabilities (including the K-annexure loans) were taken over by order of court pursuant to s 50 of the Banking and Financial Institutions Act 1989 by Arab-Malaysian Finance Bhd.

In the *Norwich Pharmacal* case,[2] Norwich Pharmacal owned a patent of a chemical called furazolidine. The Commissioners of Customs and Excise's published records showed that they had collected import duties from unnamed people who had brought the chemical into England. The importers were obviously violating Norwich Pharmacal's patent rights, and the importation could not have occurred unless the Commissioners of Customs and Excise had cleared the goods for entry. However, the Commissioners of Customs, in doing so, had committed no crime or wrong, their function being simply to ensure that the taxes were collected. The Customs refused to disclose the importers' names to Norwich Pharmacal. In an action brought by Norwich Pharmacal against Customs, the sole relief eventually sought (other claims having been made and then dropped) was that the Commissioners of Customs and Excise be ordered to disclose to Norwich Pharmacal the names of the importers.

On a summons for inspection of documents, the commissioners claiming privilege against production of the relevant documents, Graham J ordered discovery of the names and addresses of the importers.

On appeal, the Court of Appeal reversed the decision, and Norwich Pharmacal appealed. At the hearing of the appeal in the House of Lords, the appellants abandoned the contention that they had a cause of action for infringement by the commissioners themselves and the appeal proceeded on the basis that the case was and always had been an action solely for discovery.

The House of Lords allowed the appeal, and restored the order of Graham J allowing discovery.

All five members of the court were unanimous in holding that the action for discovery existed but subject to certain defined circumstances.

Lord Reid reiterated the general rule that discovery to find the identity of the wrongdoer is available against anyone with whom the plaintiff has a cause of action in relation to the same wrong. This is how his Lordship put it:

> So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession.

To the general rule aforesaid, there is, however, an exception exemplified by the *Norwich Pharmacal* case;[2] the exception being that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, yet is under a legal duty to assist the person who has been wronged by giving him full information and in making disclosure of the identity of the wrongdoers. In the words of Lord Reid:

> My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly MR and Lord Hatherley LC in *Upmann v Elkan* (1871) LR 12 Eq 140, 7 Ch App 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

It is noteworthy that Lord Morris of Borth-y-Gest took the matter a step further when he defined the circumstances under which the possessor of information would come within the exception to the general rule; what he said was this:

> It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter would wish to have for the purpose of bringing some proceedings. At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information.

Their Lordships of the House also directed their attention to the contention of counsel for the respondent that the case came within the 'mere witness' rule and so discovery could never be ordered. We need hardly add that the 'mere witness' rule provides that information cannot be obtained by discovery from a person who will in due course be compellable to give that information, either by oral testimony as a witness, or by subpoena duces tecum.

In considering the particular information required by Norwich Pharmacal, their Lordships of the House decided that the 'mere witness' rule was not applicable. No less than four members of the House (Lord Reid, Lord Cross of Chelsea, Lord Morris of Borth-y-Gest and Lord Kilbrandon) decided that a witness was one who may be able to give testimony in either pending or anticipated proceedings. They observed that in the case before them, there were no pending proceedings nor would there by any anticipated proceedings unless Norwich Pharmacal received the assistance of the courts. Viscount Dilhorne said at p 188: 'Someone involved in the transaction is not a mere witness. If he could be sued, even though there be no intention of suing him, he is not a mere witness. ... and it matters not that the involvement or participation was innocent and in ignorance of the wrongdoing.'

It is interesting to note that in the United Kingdom, there have been developments in this area of the law since *Norwich Pharmacal*;[2] for example, the jurisdiction to order discovery in aid of tracing claims was first invoked in *Bankers Trust Co v Shapira*.[3]

A This case concerned a plaintiff bank in New York which had paid out $1m to two men who had presented forged cheques drawn on a Saudi bank. The plaintiff issued a writ against the two fraudsters and a London bank claiming to trace and recover the money. They obtained a Mareva injunction against the fraudsters and then sought an order requiring the bank to disclose to them forthwith correspondence, cheques and banking records B relating to the accounts held by the fraudsters with the bank. At first instance the application was dismissed, on the ground that the fraudsters had not been served. The Court of Appeal allowed the plaintiff's appeal notwithstanding that the order granted went far beyond any available under the Bankers' Books Evidence Act 1879. Lord Denning MR regarded the C power to order discovery as a very important part of the court's armoury. He stressed that the jurisdiction must be exercised carefully, but thought that it was highly desirable that discovery should be ordered so that if the money had passed into the hands of third parties, it could be traced before they disposed of it elsewhere.

D Another example of a development in this area of the law, in the United Kingdom, is *Loose v Williamson*[4] where the lessee of a shellfish fishery, who was concerned that poachers were removing mussels from banks on the foreshore, sued the owners of vessels that had been observed fishing unlawfully and obtained an order requiring the owners to give discovery by specifying the persons on board the vessels at specified times. The court E found there was a great and imminent danger of irreparable damage to the fishery.

Loose v Williamson[4] shows that a plaintiff is entitled to discovery where the defendant is not mixed up innocently in the third party's wrongdoings but is jointly liable with him. In this context, *Societe Romanaise de la Chaussure SA v British Shoe Corp Ltd*[5] shows that disclosure of the wrongdoers' F identity alone is not enough; the obligation extends to giving information. On the other hand, a person is not liable to disclose the identity of a tortfeasor if, although he knows that identity, he has not himself either committed or facilitated or otherwise got mixed up in the commission of that tort. (See *Ricci v Chow*.[6])

G Yet another example of a development in this area of the law is *British Steel Corp v Granada Television*[7] in which the company obtained an order requiring the television section to disclose the identity of the 'mole' who had leaked confidential documents in breach of his contractual duty to the company. And, in *RCA Corporation v Reddingtons Rare Records*[8] an order was made in respect of copyright infringers.

H At this point, we would interject to remark, that at one stage during the argument, counsel for the first defendant, had asked us to consider whether *Norwich Pharmacal*[2] was a consolidation of the early authorities or whether it made new law. If the former, then he suggested that the principles enunciated there could be applied in this country by virtue of s 3(1)(a) of I the Civil Law Act 1956, which provides that:

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall —

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956.

The history of discovery and, in particular, the principles and powers exercised by the courts in the United Kingdom are clearly and concisely set out in the *Annual Practice* 1993 Vol 1 para 24/1/1 at p 432 and it is unnecessary to recapitulate that here.

Suffice it to say that the process of discovery was hardly known to the common law; it was the invention of equity. Indeed, the overriding purpose of the Bill in Chancery was, as it was said 'to scrape the conscience of the defendant'. (See per Lord Bowen in *Progress in the Administration of Justice during the Victorian Period in The Reign of Queen Victoria: A survey of Fifty Years of Progress* (1877) Vol I at pp 281–329, edited by TH Ward and reprinted in *Select Essays in Anglo-American Legal History* (1907) Vol I at pp 516–557.) The original allegations first made in the Bill by way of narrative and charge were converted, as Lord Bowen put it, 'into a chain of subtly framed inquiries addressed to the defendant, minutely dovetailed and circuitously arranged so as to surround a slippery conscience and to stop up every earth'. (Ibid.) That was the position until the middle of the nineteenth century when it was somewhat improved by the Common Law Procedure Acts which conferred powers to order limited discovery of documents and answers to interrogatories. Then, by the Judicature Acts 1873 and 1875 and the rules of court the process of discovery was made available in all divisions of the High Court.

We further note that in *Norwich Pharmacal*,[2] Lord Reid refers to the view expressed by Lord Romilly MR and Lord Heatherley LC in *Upmann v Elkan*[9] (a case decided prior to the Judicature Act 1873, in which it was held that forwarding agents Elkan must inform Upmann of the identity of the consignor of goods infringing Upmann's trademark) and said that he was 'particularly impressed' by their views.

In our view, there can be no doubt that *Norwich Pharmacal*[2] is in effect a consolidation of the early authorities on discovery, which the House had approved. We also note that the scope of *Norwich Pharmacal*[2] is limited by the 'mere witness' and 'mere tort' rules. We would respectfully follow the principles enunciated by the House of Lords in *Norwich Pharmacal* case[2] and it was with those principles in mind that we turned to consider the particular circumstances of the present case in order to decide whether the judge was right in making the order he did in fact make.

Unlike the *Norwich Pharmacal* case,[2] the present case was one where the identity of those who were alleged by the plaintiff to have committed the wrongful acts vis-a-vis the plaintiff were known to the plaintiff and, indeed they had been cited as the first to the fourth defendants in the action. Again, the cause of action pleaded against the first to the fourth defendants was grounded in *contract* so there was no question of the plaintiff being able to invoke the exception defined by the House of Lords in the *Norwich Pharmacal* case,[2] namely, that if through no fault of his own, a person gets involved in the *tortious acts* of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity

of the wrongdoers. So, on this ground alone, there was no question of the fifth defendant, being such a 'person' within the meaning of the exception.

To take the point a little further, the obligation incurred by the first to the fourth defendants to make payments of the purchase price to the borrower's account being purely contractual, no third party could be said to be mixed up in a contractual situation because of the doctrine of privity.

The next question we had to consider was whether the statement of claim disclosed a cause of action against the fifth defendant and, if so, what that was.

The judge was of the view that although the claim against the fifth defendant was primarily one for discovery, there were also claims for an order restraining the fifth defendant from seeking to enforce the claim against the borrowers and/or securities in respect of the loan accounts referred to in 'annexure K' till the disposal of the action and also for damages.

It is true that the plaintiff had by his statement of claim prayed for a restraining order, and an order for damages and, indeed, we note, that he had also prayed for an order for release and transfer to the plaintiff of all securities in respect of the loan accounts in annexure K together with any assignment of rights, the fifth defendant might have against the borrower companies and the securities under the loan accounts listed in annexure K. But, these were merely prayers for reliefs and did not by themselves indicate what the cause of action was upon which the plaintiff was relying against the fifth defendant. It was for this reason that in the course of hearing we had, more than once, specifically asked counsel for the plaintiff, to classify the plaintiff's cause of action against the fifth defendant, but, apart from saying that his client's cause of action against the fifth defendant was primarily for discovery, he was unable to say what other cause of action was disclosed in the statement of claim against the fifth defendant.

We could quite understand the problem which counsel for the plaintiff faced in having to answer our query because, quite frankly, having read and re-read the statement of claim we were unable to discern what the plaintiff's cause of action was against the fifth defendant, apart of course, from the cause of action for discovery, which was clear enough. It followed, that in our view, the judge was in error, in holding, as he did in fact hold 'that *primarily* the plaintiff's claim against the fifth defendant is an action for discovery' merely because the plaintiff had also prayed in his statement of claim for the other reliefs to which we have adverted. The judge ought to have held that the plaintiff's action against the fifth defendant was for discovery alone.

Similarly, we were also of the view, that the judge was also in error, in holding that the plaintiff had brought himself within the ambit of the exception defined by the House of Lords in the *Norwich Pharmacal* case,[2] for the reasons we have stated.

Looking back, the information which the plaintiff had sought from the fifth defendant was really an attempt to verify the defence advanced by the first to the fourth defendants of discharge by payment of the purchase price in accordance with the option as to the mode of payment of the price for the

shares provided for in the agreements. The onus of establishing a defence of discharge by payment would clearly lie on the first to the fourth defendants, and it will therefore be for them to properly substantiate that defence by adducing the necessary contemporary documentary evidence. The annexure K borrower companies into whose account with the fifth defendant, the first to the fourth defendants claimed to have made the payments, are all companies controlled by the plaintiff, and it is difficult to see why these companies may not authorize disclosure of the required information notwithstanding s 97 of the Banking and Financial Institutions Act 1989.

A final point needs to be made and it is this: a Norwich Pharmacal Order being an equitable remedy will not be granted as of right even when the requirements for it are satisfied and, so, the court has a discretion as to whether to grant or refuse it.

It follows that the fifth defendant having succeeded on his primary ground of appeal, it is unnecessary for us to delve into the other grounds of appeal.

In the result, we allowed the appeal and reversed the order of the learned judge refusing to strike out the plaintiff's claim against the fifth defendant in respect of para 17A(1) of the statement of claim. It follows that the action, insofar as it involved the fifth defendant, was struck out. We also ordered costs here and below to the fifth defendant and refund of the deposit paid into court by way of security for costs.

Appeal allowed.

Reported by Prof Ahmad Ibrahim